82-1858

NO.



IN THE

# Supreme Court of the United States

October Term , 1983

STANLEY SEYMOUR PALMER, Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

William L. Cofer, Esquire
COFER AND MITCHELL
Suite 12, First Home Federal Bldg.
120 West Third Street
Winston-Salem, N. C. 27101
(919) 725-9596

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

## QUESTIONS PRESENTED FOR REVIEW

I. In the face of Fourth Amendment prohibitions, is the search of premises under an improper warrant (one which wrongly designates the place to be searched) redeemed by petitioner's subsequent execution of inventory sheets which incorrectly reflect (in filled in blanks) that items seized have been taken from the premises named in the warrant?

II. If so, should the finality and ramification of such an "admission" require the trial court to determine in hearing whether the inventory sheets were signed voluntarily, understandably and upon the advice of counsel as mandated by the Fifth Amendment to the United States Constitution, Title 18, U.S.C. § 3501 and Miranda v. Arizona, 384 U.S. 436, 86 S.Ct.

1602, 16 L.Ed.2d 694 (1966)?

III. Was petitioner denied the speedy trial protections established by 18 U.S.C. § 3161, et seq.?

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES: PAGE



CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

## OPINIONS BELOW

The opinion below by the United States Court of Appeals for the Fourth Circuit affirming petitioner's conviction in the United States District Court for the Middle District of North Carolina has been designated for publication but has not been published at the time of the submission of this petition. A copy of the opinion is set out in full in the appendix. Motion for stay of mandate was denied by the Fourth Circuit on April 19, 1983.

Following a suppression hearing and prior to trial, a memorandum and order was entered by the district court on January 2, 1981 granting defendant Palmer's motion to suppress certain evidence obtained as a result of a search warrant which the court determined described different premises

from the ones actually searched by federal agents. From this suppression order the government took an interlocutory appeal, and in a divided opinion dated December 23, 1981, the United States Court of Appeals for the Fourth Circuit reversed, ruling that the search in question had been redeemed by defendant Palmer's signing of certain FBI inventory sheets which designated (albeit incorrectly) the premises searched as those described in the search warrant. United States v. Palmer, 667 F. 2d 1118 (4th Cir. 1981).

A copy of the published Fourth Circuit opinion is included in the appendix hereto. Petition to rehear and motion to stay mandate pending application for certiorari were denied.

## JURISDICTION

The petitioner seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit dated April 5, 1983 affirming his conviction in the United States Court for the Middle District of North Carolina for violations of 18 U.S.C. § 1955 and 18 U.S.C. § 1952 (a)(3). Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1)(1976).

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U. S. Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or thing to be seized.

U. S. Constitution, Amendment V:

No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law...

18 U.S.C. § 3501(e):

... The term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally in writing.

18 U.S.C. § 3161(b):

Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested...

F.R. Cr. P. 41(c)(1):

...If the federal magistrate or state judge is satisfied that grounds for application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched.

## STATEMENT OF THE CASE

On October 27, 1980 petitioner was

indicted with eight others for allegedly conducting an illegal bookmaking business in violation of 18 U.S.C. § 1955. Petitioner was charged additionally with use of an interstate facility (a telephone) in violation of 18 U.S.C. § 1952(a)(3) and (2).

Pleas of not guilty were entered on behalf of petitioner at his November 3, 1980 arraignment. Petitioner was given until November 12, 1980 to file pretrial motions. Trial was set for December 8, 1980.

Pretrial motions were filed in a timely fashion by counsel for petitioner. These were heard as originally scheduled.

Motion for severance made by petitioner was denied as was his motion to dismiss for speedy trial violations. But in a detailed memorandum and order entered

January 2, 1981 the district court granted petitioner's motion to suppress the search made in his case.

From this suppression order the government took an interlocutory appeal. In a divided opinion dated December 23, 1981 the Fourth Circuit panel which heard the matter reversed, ruling that the search in question had been redeemed by petitioner's "admission" in signing inventory sheets that the premises entered were those designated in the warrant. United States v. Palmer, 667 F.2d 1118 (4th Cir. 1981). Motions for rehearing and for stay of mandate pending application for certiorari to the United States Supreme Court were denied and the matter was remanded to the district court for trial.

Prior to trial, petitioner, refiled and reargued motions to suppress, to sever

and to dismiss for violations of speedy trial provisions. These motions were denied.

Petitioner's trial in the district court substantially reestablished the facts found by the court in its January 2, 1981 suppression order. Testimony and exhibits adduced that on Sunday, December 16, 1979, federal agents carried out several simultaneous "gambling raids" in adjoining piedmont North Carolina counties. The search directed against petitioner took place at a small, rural shopping center just outside Winston-Salem, North Carolina.

In petitioner's case, F.B.I. agents, armed with search warrants for "the premises known as Carl's Carpet Mart, Inc." (an active retail business at the northernmost end of the subject shopping center), conducted their search instead in a fully

separated, middle space of said shopping center, an area plainly designated by exterior signs as "Miller-Arrington". In two months of close agent surveillance petitioner had never been seen to enter or exit Carl's Carpet Mart or any other parts of the shopping center except the "Miller-Arrington" space. Nor was it shown (by wire intercept or otherwise) that he ever used the telephones which were seized in the search of the "Miller-Arrington" premises.

On the afternoon of the "gambling raids" and within seconds of their gaining access to the "Miller-Arrington" space, agents placed petitioner in "custody". He remained in custody for some three hours while officers first searched and then lingered on the premises trying to intercept incoming telephone calls.

Before departing, agents had petitioner routinely sign an inventory sheet into the blanks of which they at some point erroneously described the searched premises as "Carl's Carpet Mart". (In fact Carl's Carpet Mart was never searched, or even entered.) Petitioner had previously asked for the chance to get in touch with his attorney, but had been denied the opportunity to do so from an operable telephone.

A jury returned a verdict of guilty against petitioner and five of the six co-defendants tried with him and judgment was entered on March 1, 1982. Petitioner and two others appealed.

On April 5, 1983 the United States Court of Appeals for the Fourth Circuit affirmed petitioner's conviction, but reversed the convictions of his co-appellants

for insufficient evidence. In its opinion (not yet published, but included in the appendix hereto) the Court of Appeals concluded that the evidence seized in the disputed search, coupled with the governments expert's interpretation of said evidence, was sufficient to support petitioner's conviction. The Court rejected petitioner's reargurments, raised again herein, regarding defective search, involuntary admissions, and speedy trial.

## ARGUMENT

I. A DEFENDANT'S SUBSEQUENT EXECUTION OF INVENTORY SHEETS IN THE BLANKS OF WHICH AGENTS INCORRECTLY STATE THE NAME OF THE PLACE THEY HAVE SEARCHED (TO CONFORM TO THE WARRANT) SHOULD NOT REDEEM A SEARCH OF PREMISES NOT DESIGNATED IN THE WARRANT INITIALLY.

The District Court originally (and properly) suppressed the seized evidence in this case. Its suppression order followed a hearing wherein testimony and exhibits clearly established that officers conducted their search not at "Carl's Carpet Mart" (as directed by the warrant) but at an adjacent store in the same small shopping center, a store separated from Carl's by an unbroken party wall, one whose front entrance was clearly labeled "Miller-Arrington", and the only premises into and out of which defendant Palmer (now the petitioner) was ever seen to enter or exit.

On the government's interlocutory appeal from the suppression order the Fourth Circuit panel which heard the matter voted two to one to reverse. United States v. Palmer, 667 F.2d 1118 (4th Cir. 1981). The panel majority, while tacitly admitting that the disputed search was improper, nevertheless held that because the subject defendants allegedly signed several form-type, seized-property inventory sheets, in the blanks of which agents at some point had written in "Carl's Carpet Mart" or "Carl's Carpet", the unlawful search was redeemed.

The majority opinion cited the signatures on the inventory sheets as an "admission" that the search took place on the premises authorized. The signed statements were interpreted as "uncontroverted evidence" that defendant Palmer and a co-

defendant regarded the premises they occupied as indeed being a part of Carl's Carpet Mart. The majority opinion declined to hold that the searched premises were not those described in the warrants "when the defendants themselves obviously regarded them as the same".

In his well-reasoned minority opinion Circuit Judge Hall insisted that the majority "unduly emphasized a document which is nothing more than an inventory sheet". His dissent pointed out that the significance of the inventory sheets would almost certainly be lost on the defendants in the confusion surrounding the search. He concluded with the straightforward observation that "any attempt to justify the search is an exercise in post hoc rationalization".

Whatever the rationale, and giving

it all due credit for assuring petitioner's ultimate conviction, the Fourth Circuit ruling in this case sets a precedent of "plain bad law", and one which, if left to stand, will cause far more harm than good to law enforcement efforts. Inventory sheets, after all, are employed to protect officers and avoid trial controversy by clearly establishing what property was and was not taken in a given search. Against the bizzare Palmer decision (in effect reaffirmed on the recent appeal), suspects no doubt will become increasingly reluctant to sign inventory sheets, or any other routine document, for fear of the unforseen implications of their signatures.

If the labored redemptive theory is discarded, as it rightfully should be, the facts of this case fall fully within United States v. Kaye, 432 F.2d 647 (D.C.

Cir. 1970) and Keiningham v. United States 287 F.2d 126 (D.C. Cir. 1960). In Kaye the United States Court of Appeals for the District of Columbia held that where the warrant under which the search was conducted authorized the search of 3618 14th Street (the defendant's store) the search of defendant's apartment, which was above the store, but had no door or direct passage to it, was unlawful, even though the description in the supporting affidavit was of "a two-story brick building" in which both the store and the apartment were located. (Interestingly, in Kaye the bills for gas, electricity, and telephone service for both areas, store and apartment, were sent to the defendant.)

In reversing defendant Kaye's conviction the D. C. Circuit Court observed:

"The store and apartment were not an

integrated unit but were two separate and distinct parts of the building. There was no access to the apartment from the store and no apparent connection between the two. The arrangement is typical of that so frequently existing in urban communities where living quarters are found over stores. When a store and an apartment are thus arranged a warrant authorizing search of the store——as this warrant did——can hardly be stretched to justify an intrusion into the apartment, regardless of language in the supporting affidavit which might be construed more broadly. (Omitting cites.) It is the description in the search warrant, not the language of the affidavit, which determines the place to be searched."

In Keiningham, supra, the court, in holding that the trial court should have allowed appellants' motion to suppress stated:

"The Government contends that since appellants were using the two houses as a single unit, the search warrant for 1106 should somehow be construed to embrace 1108 as well. It seems to be the Government's theory that 1108 became a part of 1106 because of the use to which the two houses were put

> by appellants. This contention is unsound. We know of no clause in the warrant issued extending the authority granted therein in the event of unforseen circumstances, and it is well settled that search warrants must be strictly construed. The authority to search is limited to the place described and does not include additional or different places." (Emphasis supplied.)

In petitioner's case, the search warrant provided for the search of Carl's Carpet Mart, but the entire search was conducted at the adjacent area, "Miller-Arrington". There should have been no difficulty in separately describing each for search purposes. A large "Carl's Carpet Mart" sign extended along the front of that store. A glass panel over the front door of the searched premises was clearly marked "Miller-Arrington".

There was absolutly no internal access between the two shopping center spaces and no real reason to suspect that

the two connected. Agents discovered nothing during a sham shopping trip inside Carl's Carpet Mart to support a physical connection with the adjacent "Miller-Arrington" location. More importantly, at no time did surveilling officers see petitioner or any other defendant go into or come out of any part of the shopping center except the Miller-Arrington space.

At first glance the facts in the instant case seem ripe for application of the "good faith" exception suggested in United States v. Williams, 622 F.2d 830 (5th Cir. 1980). Closer examination shows otherwise.

As the Williams dictum conceded, and good sense requires, "good faith" alone is not enough:

> "We emphasize that the belief, in addition to being held in subjective

> good faith, must be grounded in an objective reasonableness. (Emphasis supplied.) It must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully." United States v. Williams, supra, 841.

No objective person, being familiar (as were the agents in the case on appeal) with the shopping center in question, could have reasonably believed, upon the slightest reflection, that a search warrant for "Carl's Carpet Mart, Inc." would fairly describe and authorize an invasion of the premises actually searched.

When all is said and done in the present case the answer to one elementary question is really determinative of the central issue:

> COULD INVESTIGATING OFFICERS HAVE COOPERATED WITH THE MAGISTRATE TO DEVISE AN UNAMBIGUOUS DESCRIPTION OF THE PREMISES THEY INTENDED TO SEARCH?

Clearly they could have.

As the District Court observed in suppressing the search of the premises occupied by petitioner:

> "...having identified the rear offices of Area "B" as the situs of the suspected illegal activity, government agents could have either sought an additional warrant which particularly identified those premises as the area to be searched or included a specific description of the offices in the rear of Area "B" on the warrants actually obtained."

In sum, as Judge Hall concluded in his Fourth Circuit dissent, and as the diagram he incorporated clearly shows, "this case arose as a result of the agents' çarlessness". These agents had two months to determine where they wanted to search. They should have obtained a proper warrant to search the Miller-Arrington store. Their failure to do so should cause the forfeit of the evidence seized.

II. IF A DEFENDANT'S EXECUTION OF INVENTORY SHEETS IS TO BE CONSTRUED AS AN INCRIMINATORY ADMISSION AND, IN EFFECT, A WAIVER OF FOURTH AMENDMENT RIGHTS, A HEARING SHOULD BE REQUIRED, UPON REQUEST, TO DETERMINE WHETHER SUCH "ADMISSION" WAS MADE VOLUNTARILY, UNDERSTANDABLY AND UPON THE ADVICE OF COUNSEL.

At a hearing in the District Court upon his renewed motion to suppress, petitioner proffered evidence that, after being advised of his rights, and before signing the inventory sheets which agents placed before him, he asked to call his attorney but was not given a reasonable opportunity to do so. The presiding judge refused to receive this or any other evidence pertaining to the circumstances surrounding the execution of the incriminating forms. Trial testimony confirmed that petitioner had been placed in "custody" at the outset of the disputed search and detained thereafter for some

three hours.

A long line of cases culminating with Miranda v. Arizona, 384 U.S.C. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966) and the enactment of Title 18, U.S.C. § 3501 requires that a confession be voluntarily given. The relevant code provision defines confession as:

> "...any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing."

When, as here, a defendant's "admission" puts him in possession of alleged "gambling evidence" and constitutes a waiver of his Fourth Amendment rights, the burden should be upon the government to show, and every effort should be made to insure, that it was voluntarily supplied. To proceed otherwise would give officers a sure license to guarantee every search and

seizure in advance by obtaining from the subject defendant (by whatever deceit or duress necessary) an admission that all was properly done.

III. PETITIONER WAS DENIED THE SPEEDY TRIAL PROTECTIONS ESTABLISHED BY 18 U.S.C. § 3161, et seq.

The government's evidence at trial established that petitioner was taken into "custody" at the Miller-Arrington store on December 16, 1979 (the date of the disputed search) and was restrained and detained there for over three hours while officers searched him and a co-defendant, seized pads, pencils, sports information publications, trash cans, and similar items from small connecting offices, and intercepted several in-coming telephone calls.

Some ten months later, on October 27,

1980, and based on "evidence" seized in the December 16, 1979 search, petitioner was indicted. Motions and renewed motions to dismiss the indictment for prosecutorial delay and for non-compliance with speedy trial were heard and denied.

Granting that, within bounds, a person may be required to remain on premises during the execution of a valid (query here?) search warrant, detention should be limited to reasonable necessity. Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). United States v. Timpani, 665 F.2d 1 (1st Cir. 1981)

The extended detention here far exceeded any legitimate search requirements and amounted to an arrest. Sharpe v. United States, 660 F.2d 908 (4 Cir. 1981).

18 U.S.C. § 3161(b) mandates:

> "Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days (emphasis added) from the date on which such individual was arrested..."

By definition, petitioner was arrested on December 16, 1979. His indictment on October 27, 1980 was not timely under 18 U.S.C. § 3161(b) and, for this reason, the indictment should have been dismissed.

## CONCLUSION

Based on the foregoing, the petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

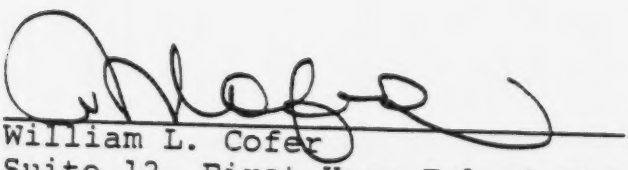
William L. Cofer
Suite 12, First Home Federal Bldg.
120 West Third Street
Winston-Salem, N. C. 27101
(919) 725-9596

## CERTIFICATE OF SERVICE

I hereby certify that I have on this 3rd day of May, 1983 mailed three copies of this petition, first class postage prepaid, to each of the following parties:

Douglas Cannon
Assistant U. S. Attorney
Post Office Box 1858
Greensboro, North Carolina 27402

Solicitor General
Department of Justice
Washington, D. C. 20530



William L. Cofer
Suite 12, First Home Federal Bldg.
120 West Third Street
Winston-Salem, N. C. 27101
(919) 725-9596

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-5061

UNITED STATES OF AMERICA,

Appellant

v.

STANLEY SEYMOUR PALMER and
STEPHENSON ALEXANDER PRICE,

Appellees

---

Appeal from the United States District Court for the Middle District of North Carolina, at Salisbury. Richard C. Erwin, District Judge.

---

Argued August 5, 1981
Decided December 23, 1981

---

Before RUSSELL, WIDENER and HALL, Circuit Judges.

---

Sidney M. Glazer, Department of Justice (Henry M. Michaux, Jr., United States Attorney, on brief) for Appellant, Eddie C. Mitchell and William L. Cofer for Appellees.

WIDENER, Circuit Judge:

This is an interlocutory appeal from the order of the district court granting the motions of defendants to suppress evidence seized pursuant to search warrants. The whole question presented is whether the search warrants particularly described the place to be searched, as required by the Fourth Amendment. The defendants ask us to hold that the search was conducted on premises other than those described in the search warrant, i.e., "Carl's Carpet Mart." We reverse.

On October 27, 1980, appellees Stanley S. Palmer and Stephen A. Price,

along with seven others, were indicted for carrying on an illegal bookmaking business and for using the interstate telephone system to obtain information used in receiving and placing bets on sporting events, in violation of 18 U.S.C. § 1955, 1952(a)(3) and 1084(a). The indictments followed an extensive F.B.I. investigation, which culminated in the execution of the search warrants in question against the several defendants in December, 1979.

At issue in this appeal are the two warrants to search Palmer and Price and Carl's Carpet Mart on December 14, 1979 and executed on December 16, 1979. The warrants authorized a search of the persons of Palmer and Price "at Carl's Carpet Mart, Inc., New Lexington Road, Route 11, Box 246, Winston-Salem, North Carolina"

and the premises of Carl's Carpet Mart, Inc., at the same address. No further description was given on the face of the warrants. The warrants were issued by a United States Magistrate on the basis of the affidavit of Special Agent Schatzman, who had conducted the F.B.I. investigation.

The affidavit, 34 typed pages in length, sets out probable cause to search in detail and abundance. It asserts that the F.B.I. had learned through informants of the bookmaking activities of Palmer and Price during the summer of 1978. Between August 28, 1979 and December 6, 1979, various unnamed informants advised F.B.I. agents that Palmer and Price were conducting their bookmaking business over telephone numbers 764-4900 and 764-4901. Records of Southern Bell Telephone Com-

pany showed that these two telephones were billed to Carl's Carpet Mart, as were two other telephones. Toll records for these phones for August through November 1979 revealed several hundred calls to other suspected participants in the bookmaking operating, as well as numerous calls to sports information services in New York and Los Angeles.

The F.B.I. conducted spot checks of the suspected bookmaking operations between October 23, 1979 and December 9, 1979. Carl's Carpet Mart is located at one end of an L-shaped shopping center, containing three other business premises. On the roof over Carl's Carpet Mart is a large sign stating the name of the establishment. That store has three sets of double doors in front. Adjacent to Carl's

Carpet Mart are premises the front part of which had been formerly occupied by Miller-Arrington appliance store. The name "Miller-Arrington" is written on the glass above the entrance, which is the fourth set of double doors from the left. The showroom area of those premises was rented by Lacey Miller at the time the warrants were executed. He conducted periodic antique auctions there. From the public area of Carl's Carpet Mart and the outside of the Miller-Arrington premises, an unbroken plywood panel partition between the two premises was visible which extended from the front of the building to about two-thirds the way to the back. A private area containing restrooms was located at the rear of Carl's Carpet Mart, obscuring the remainder of the interior

plywood partition from the view of agents conducting the surveillance. Similarly, the rear of the Miller-Arrington premises was partitioned off into private offices. Price paid the rent on those premises as well as reimbursing the considerable telephone bill to Carl's Carpet Mart.

On several occasions during the surveillance period, Agent Schatzman observed Price and Palmer entering or leaving the Miller-Arrington premises. They always used the fourth set of double doors from the left. Schatzman testified at the hearing on the motion to suppress that he had never observed either Price or Palmer use any of the first three sets of double doors on the left, but always the fourth.

When F.B.I. agents, including Schatzman, executed the search warrants at issue,

they entered through the doors with "Miller-Arrington" written on them, the fourth set of doors from the left which Price and Palmer had used. They searched the enclosed area at the back of the premises, that which was rented by Price, which consisted of several cubicles. The telephones bearing numbers 764-4900 and 764-4901 were both found in the back cubicles. The agents found no door connecting those premises with those of Carl's Carpet Mart. The agents did not search elsewhere.

After the search was conducted, returns on the warrants were made, listing the items seized. A separate return was made for each search of the person as well as one for the premises. Following the list of items seized on the return for

"these premises" was the following statement:

> This is to certify that on December 16th 1979 at Davidson Co. North Carolina, Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice, at the time of conducting a search of (...)[1] premises at Carls Carpet Mart, obtained the listed items. I further certify that the above represents all that was obtained by Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice.
>
> (Signed) (s) Stanley S. Palmer
> (Signed) (s) S. A. Price

In addition, Price and Palmer each signed a statement on the return of the search warrant for his person in almost identical language to that just quoted above. That of Price described the premises as

---

1. The word "or" has been omitted in copying, it obviously having not been marked through by mistake.

as "Carl's Carpet Mart," while that of Palmer described them as "Carl's Carpet."

Signing the statements on the returns which specified the premises searched as being those of Carl's Carpet Mart is an admission by Price and Palmer that the search took place on the premises authorized in the search warrants. The statements are uncontroverted evidence that they regarded the premises they occupied in their bookmaking operation as indeed being a part of Carl's Carpet Mart. We decline to hold that the premises searched were not those described in the warrant when the defendants themselves obviously regarded them as the same. If a warrant specifies a place under the designation by which it is commonly known, though the exact description may not be correct,

the warrant will be upheld. See United States v. Wright, 468 F.2d 1184 (6th Cir. 1972).

The order of the district court is accordingly

REVERSED.

HALL, Circuit Judge, dissenting:

The agents in this case searched the Miller-Arrington store even though the warrant authorized them to search only Carl's Carpet Mart. The majority overlooks this discrepancy because the defendants signed warrant returns in which they noted that the search was conducted at Carl's Carpet Mart. I cannot attach that much importance to a layman's signature upon the return of a search warrant, and

therefore, I respectfully dissent.

The physical layout of the two stores gives no reason to believe that they are one and the same.[1/] Although adjacent in a small shopping center, the stores are separated by a wall and have no interior access between them. (See diagram.)

---

1/The agents thought that the stores were connected because the telephones located in the Miller-Arrington store were listed in the name of "Carl's Carpet Mart," and because the defendants paid rent to Carl's. The agents' suspicions simply will not support this warrant. Common ownership and phone listings prove nothing. See, United States v. Kaye, 432 F.2d 647 (D.C. Cir. 1970). The owner of Carl's also owned the entire shopping center, so the defendants naturally would pay their rent at the carpet store. Further, Carl's Carpet Mart could have had extension phones all over town, but a warrant to search "Carl's Carpet Mart" would not permit agents to search each of those locations.

There is a sign on the roof directly over larger store designating it as "Carl's Carpet Mart." The doors to the other store are clearly labelled, "Miller-Arrington." The Miller-Arrington store is obviously a separate business, perhaps not a lively one at the time of the search, but certainly not part of the carpet store.

Further, the activities of the defendants gave no indication that the Miller-Arrington store was part of Carl's Carpet Mart. During the two months in which FBI agents kept the defendants under surveillance, they never saw them enter or leave through any doors except those marked "Miller-Arrington." Although armed with a warrant to search "Carl's Carpet Mart," the agents themselves did not begin

their search at the carpet store, but proceeded directly through the Miller-Arrington doors and confined their search to that store.[2/]

The majority virtually admits that the warrant was improper, but nevertheless would sanction the search because the defendants signed returns on the warrant in which they designated the searched premises as "Carl's Carpet Mart." My brethren unduly emphasize a document which is nothing more than an inventory

---

[2/]The facts of this case are clearly distinguishable from the situation in United States v. Wright, 468 F.2d 1184 (6th Cir. 1972), cited by the majority. In Wright, agents with a warrant to search "The New Plaza Lounge" searched the lounge first and then searched a sealed-up back room which, up until three weeks before the search, had been connected to the lounge by a door.

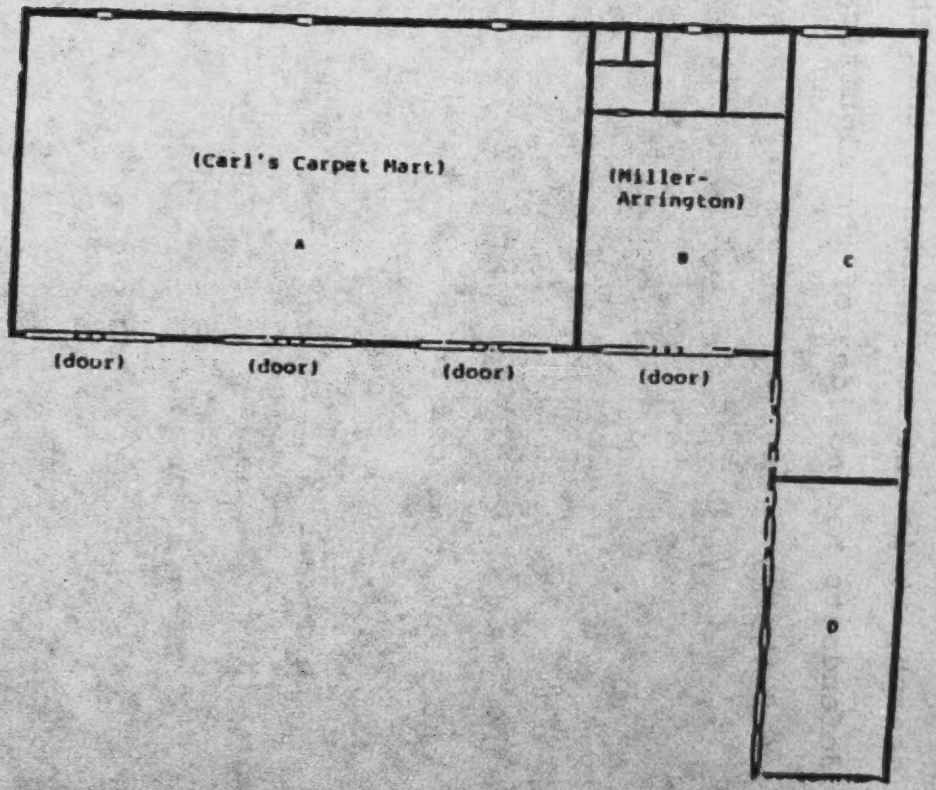
sheet. In the confusion surrounding the search, it is entirely probable that the defendants had no idea of the significance of the description on the return.

In sum, this case arose as a result of the agents' carelessness. These agents had two months to determine where they wanted to search. They should have obtained a warrant to search the Miller-Arrington store.[3/] Any attempt to justify this search is an exercise in post hoc rationalization.

I therefore would affirm the district court's decision to suppress the evidence obtained in this search.

---

[3/] The affidavit supporting the warrant (which was not attached to it or shown to the defendant at the time of the search) indicated that the agents did want to enter at the fourth set of doors which was the only entrance to the Miller-Arrington store.


(Carl's Carpet Mart)
A
(Miller-
Arrington)
B
C
D
(door)
(door)
(door)
(door)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NOS.
82-5119, 82-5120,
82-5121, 82-5122,

UNITED STATES OF AMERICA,

Appellee

v.

ANDREW MICHAEL SMITH,
STANLEY SEYMOUR PALMER,
JAMES EDWARD CHRISTY, and
ANDREW MICHAEL SMITH,

Appellants

---

Appeals from the United States District Court for the Middle District of North Carolina, at Salisbury. Hiram H. Ward, Chief Judge.

---

Argued January 14, 1983
Decided April 5, 1983

---

Before RUSSELL and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

---

V. Edward Jennings, Jr., for appellant Smith; Kenneth Kyre, Jr. (Nichols, Caffrey, Hill, Evans & Murrelle on brief) for appellant Christy; William L. Cofer (Cofer and Mitchell on brief) for appellant Palmer; (E. Raymond Alexander, Jr., Alexander, Moore & Baynes on brief) for appellant Smith; David B. Smith, Assistant United States Attorney (Kenneth W. McAllister, United States Attorney, Douglas Cannon, Assistant United States Attorney, Caren W. Allen, Paralegal Specialist on brief) for appellee.

BUTZNER, Senior Circuit Judge:

Andrew Smith, Stanley Palmer and James Christy were convicted by a jury of conducting an illegal gambling business in violation of 18 U.S.C. § 1955. Smith and Palmer also were convicted of using an interstate facility (a telephone) in the promotion of a business enterprise involving gambling in violation of 18 U.S.C. § 1952(a)(3). In addition, Smith's probation was revoked on the basis of his

convictions.[1]

We affirm Palmer's convictions. We reverse Smith's and Christy's convictions because the evidence was insufficient to sustain the jury's verdict. We also vacate and remand the revocation of Smith's probation.

Count I of the indictment charged Smith, Palmer and Christy with violating 18 U.S.C. § 1955 by knowingly and willfully conducting, financing, and owning from August 5, 1979, through December 16,

---

1. This court previously reversed an order disqualifying Smith's attorney because of an alleged conflict of interest. United States v. Smith, 635 F.2d 126 (4th Cir. 1981). The court also reversed an order of the district court suppressing evidence seized in the search of premises occupied by Palmer. United States v. Palmer, 667 F.2d 1118 (4th Cir. 1981).

1979, "part of an illegal gambling business involving bookmaking and accepting wagers on sporting events."[2] To prove a violation of § 1955, the government must establish three elements: (1) the existence of a gambling business which is illegal under the laws of the state in which it is conducted; (2) the involvement of five or more persons in the operation of the business; and (3) the substantially continuous operation of the business for a period in excess of 30

---

2. Six other persons--Stephenson Price, Harry Nash, Dewey Cross, Jeffrey Littleton, Lynn James, and Henry Loman--were indicted. Nash and Loman pled guilty before trial. Only James was acquitted. Price and Cross did not appeal their convictions. Littleton filed an appeal but voluntarily dismissed it under Fed. R. App. P. 42(b).

days or gross revenues of $2,000.00 in any single day.[3]

I

Through the use of gambling records admitted in evidence against Palmer and the explanation of the records by an expert witness, the government proved every element of the offense to establish that Palmer violated § 1955. We find no merit therefore in Palmer's assertion that the evidence is insufficient to sustain the verdict of the jury on Count I. We also

---

3. It is uncontested that a gambling business, if shown to exist by the government, is illegal under the laws of North Carolina. See N.C. Gen. Stat. § 14-292 (1981). The government has proceeded in this case solely on the theory that the gambling business had gross revenues of $2,000 in a single day.

find that the evidence was sufficient to sustain Palmer's conviction on Count III for making interstate telephone calls in violation of 18 U.S.C. § 1952(a)(3) to carry on the gambling business.

Palmer's rights under the Speedy Trial Act, 18 U.S.C. §§ 3161 et seq., were not violation by his detention during the search of his premises. Officers searching a location have the authority to detain the occupants while a proper search is conducted. Michigan v. Summers, 452 U.S. 692, 705 (1981). When the officers left the premises after completing their search and seizing Palmer's records, he was no longer detained. He was not arrested until ten months later. The facts indicate the detention of Palmer during the search did not amount to an

arrest that would invoke the provisions of the Speedy Trial Act. Cf. United States v. Timpani, 665 F.2d 1 (1st Cir. 1981).

We find no cause for reversal in his other assignments of error. The judgment against Palmer is affirmed.

II

The only documents admitted against Christy were telephone toll records showing calls to and from Palmer's phone. An F.B.I. agent testified that Christy admitted running a small "poker-liquor" house and placing wagers in the fall of 1979 on football games for people, usually in the amount of $50-$100 several times a week.

The evidence against Christy, stand-

ing alone, was not sufficient to show he violated § 1955. The government sought to remedy this hiatus in its proof by linking him to Palmer's illegal gambling operation. It attempted to do this by its expert's analysis of the records admitted against Palmer, which disclosed, in addition to the illegality of Palmer's operation, that Christy was a writer for Palmer.

The evidence against Smith consisted of parlay cards and a calculator tape obtained during a search of his residence. The government also introduced a photograph of his phone and his phone toll records, which disclosed calls to and from Palmer and numerous interstate calls to two businesses that furnished information about sporting events. Testimony established that Smith was acquainted with two

codefendants, Price and Littleton, and that a bettor had placed a wager with Littleton over Smith's phone.

The evidence against Smith standing alone was insufficient to prove the elements necessary to show he violated § 1955. The government therefore sought to associate him with Palmer's gambling business. The essential link was Littleton, who was shown to be affiliated with Palmer. The government's expert testified that his analysis of records admitted against Littleton disclosed that Smith had a financial interest in Littleton's gambling activities. He did this by comparing the adding machine tape admitted against Smith with corresponding entries found in the records admitted against Littleton.

At the conclusion of the government's

case, the prosecutor moved that all evidence admitted during the trial be admitted against each of the defendants. Counsel for Christy and Smith both objected to the government's motion. After the court expressed some doubt about the motion, the prosecutor withdrew it. The prosecutor then moved that the exhibits admitted against Palmer, which established the existence of an illegal gambling business, be admitted against Littleton. The court granted this motion. The court denied a motion to admit the Palmer and Littleton exhibits against Smith, but it observed that the connection between Littleton and Smith had been sufficiently explained by the expert's analysis of the Littleton and Smith exhibits. The court subsequently denied the defendants' motions

for judgment of acquittal.

The court's instructions to the jury were consistent with the prosecutor's withdrawal of his motion that all evidence be admitted against each of the defendants and with the court's denial of the motion to admit the Palmer and Littleton exhibits against Smith. Although the court told the jury that they could consider all of the exhibits, it specifically cautioned: "You must determine the guilt or innocence of each defendant as to each separate offense charged by giving separate consideration to the evidence which applies to him as to each count."

Christy and Smith contend that the Palmer records, which disclosed the existence of an illegal gambling business, were hearsay with respect to them. Smith

makes the same contention about the Littleton records. They point out that in the absence of proof otherwise associating them with Palmer's gambling business, this hearsay was inadmissible against them. The trial court and the prosecutor seemingly recognized the validity of these contentions, for in the final analysis the incriminating Palmer and Littleton records were not admitted against them.

We conclude that Christy's and Smith's positions are sound. The evidence disclosed by the Palmer records were indispensible to linking Christy to Palmer's illegal business, and the Littleton records were indispensible to show the link with Smith. Proof that Christy and Smith phone Palmer or that Palmer phoned them is not enough to establish the connec-

tion, for only by analysis of the excluded records can it be surmised that the phone calls were incriminating. Palmer's and Littleton's records were no more than their declarations made in the absence of Christy and Smith. The expert simply deciphered these hearsay declarations to explain how they referred to Christy and Smith. Without proof independent of the Palmer and Littleton records, the association of Christy and Smith in Palmer's illegal business cannot be shown. As Glasser v. United States, 315 U.S. 60, 75 (1942), cautions: "Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence."

The government seeks to avoid the precept of Glasser by relying on the opinion of its expert whose analysis of the

Palmer and Littleton records provided the basis for his opinion that Christy and Smith were associated in the illegal gambling business. The government points out that Christy did not object to the expert's testimony and Smith made only a general objection.

We cannot accept the government's position. When the expert testified about the Palmer records, the records had been admitted only against Palmer. When he testified about the Littleton records, they had been admitted only against Littleton. His testimony was germane to the case against Palmer and Littleton, for it was incumbent on the government to prove the nature of the gambling business Palmer and Littleton conducted to establish the elements of § 1955. We cannot

fault counsel for Christy and Smith for assuming that testimony about exhibits that had never been admitted against them pertained only to their codefendants against whom the exhibits were admitted. Moreover, they did object when the government subsequently moved that "all of the evidence admitted during this trial be admitted as to each of the defendants." This, of course, included the expert's testimony and the exhibits on which he relied. After the court expressed some hesitancy about granting the motion, the prosecutor said: "Your honor, the government will withdraw its motion to offer the evidence previously stated . . . ."

We therefore conclude the evidence was insufficient to establish that Christy and Smith violated § 1955, and their convictions must be reversed. We direct the

remand to dismiss the charges set forth against them in Count I of the indictment. See Burks v. United States, 437 U.S. 1 (1978).

III

Smith was convicted under Count VII of violating the Travel Act, 18 U.S.C. § 1952(a)(3), which proscribes the use of interstate telephone facilities to promote or carry on a business enterprise involving gambling in violation of the laws of the state where the business is conducted. The "business enterprise involving gambling" to which reference is made in § 1952 need not be as extensive as the "illegal gambling business" defined in § 1955. Nevertheless, to prove Smith violated § 1952, the government was re-

quired to show that he made interstate phone calls to promote or carry on a "business enterprise involving gambling."

To prove Smith's guilty, the government relied on the Palmer and Littleton exhibits to show that he was associated with them in an illegal gambling business. The government's proof showed no other business enterprise involving gambling. The insufficiency of the evidence to link Smith to Palmer and Littleton therefore requires reversal of Smith's conviction for violating § 1952(a)(3).

We therefore reverse the judgment of Smith's conviction for violating § 1952 and remand for dismissal of Count VII. The record discloses that Smith's probation was revoked because of his convictions, which we have now set aside.

Accordingly, we vacate the order of revocation, without prejudice, however, to the government's right to show, if it can, any other violation of the terms of his probation.

No. 82-5119 (Smith-probation revocation), VACATED AND REMANDED;

No. 82-5120 (Palmer-Counts I and III), AFFIRMED;

No. 82-5121 (Christy-Count I), REVERSED AND REMANDED;

Now. 82-5122 (Smith-Counts I and VII), REVERSED AND REMANDED.